Supreme Court, U.S.
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In The
Supreme Court of the United States

EDWARD WILHELM,
Petitioner,

v.

JOHN A. BOGGS, Deputy,
JOSEPH TANNER, Deputy,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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August, 2002

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4 pp

QUESTION PRESENTED FOR REVIEW:

Can an appellate court reviewing the denial of a motion for summary judgment on the issue of qualified immunity refuse to apply a general rule established by the United States Supreme Court upon the sole basis that an opinion of the appellate court, if extended, may be inconsistent with the established law?

PARTIES TO THE PROCEEDINGS:

Edward Wilhelm
John A. Boggs, Deputy
Joseph Tanner, Deputy
Board of Commissioners of Mahoning County

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Petitioner respectfully petitions a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit Opinion (App. A at A-1) is a published opinion. The District Court Opinion (App. C at C-1) is an unpublished opinion.

STATEMENT OF BASIS FOR JURISDICTION

Judgment in the United States Court of Appeals for the Sixth Circuit was decided and filed May 22, 2002, reversing the denial of the defendants' request for qualified immunity issued by the United States District Court for the Northern District of Ohio at Akron on November 3, 2000.

The Sixth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and jurisdiction exists under Rule 10(c) of the Supreme Court Rules. The Sixth Circuit Court of Appeals held that the defendants were entitled to qualified immunity as a matter of law in a civil suit for damages arising out of a forced entry and search of the plaintiff's home. The plaintiff was a tenant of an estate, renting a single-family dwelling. The deputies entered against plaintiff's will solely upon the consent of the administrator of the estate. While the Court of Appeals recognized the well-

established law of *Chapman v. United States,* 365 U.S. 610 (1961), holding that a landlord cannot validly consent to the search of a house he has rented to another, the appellate court nonetheless found there was no clearly established infringement of a federal right. The sole basis relied upon by the appellate court was its decision eight years earlier in the case of *United States v. Roark*, 36 F.3d 14 (6th Cir. 1994). *Roark* involved suppression of evidence of illegal drug and firearm possession. In *Roark*, the defendant's sister owned two homes on the same property, one in which she resided and one in which her brother, the defendant, resided. The sister consented to a police search of her home. The appellate court in *Roark*, while reversing on other grounds, held that the sister, by way of her ownership or common control, had the authority to consent to a search of the adjoining home.

The important question of federal law which presents itself to this Court in this particular case is the extent to which a lower court can make a finding of a qualified immunity based upon cases which must be extended to a position inconsistent with well-established law enunciated by the United States Supreme Court. Further, the "common authority" doctrine should not apply to persons who are not cohabitants of a home when the resident is at home and resists the forced entry. No reasonable police officer (absent a court order) would enter a home against the wishes of the resident solely because an owner out of possession consents.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4th Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
(Effective 1971)
Comparative Legislation
Search and seizure, Ohio Const. art. I, § 14.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

Edward Wilhelm resided at 4130 Crum Road in Mahoning County, Ohio. The home was owned by his father, Charles Wilhelm, who died in January of 1997. There were disputes among the family with respect to the Estate of Charles Wilhelm. On September 7, 1999, Edward Wilhelm's sister, Sherl Foster, was appointed Administratrix of the Estate of Charles Wilhelm.

Prior to that time, the Mahoning County Probate Court established a monthly rental amount to be paid by Edward Wilhelm for his continued use of the home. The Probate Court further directed Edward Wilhelm to pay all utility bills, and if rentals were not paid satisfactorily, the Estate was ordered to bring eviction proceedings under Ohio's forcible entry and detainer statutes.

The specifics of the case arise out of the appearance upon the doorstep of Edward Wilhelm's home of the defendant sheriff's deputies, John A. Boggs and Joseph Tanner. These deputies accompanied by Sherl Foster, the Administratrix of the Estate, forcibly entered the home of Edward Wilhelm and his fiancee´, Laura Jeffers, and searched the premises purportedly for the purpose of conducting an inventory.

Edward Wilhelm filed the instant case in the United States District Court for the Northern District of Ohio alleging violation of 42 U.S.C. § 1983 and jurisdiction in the District

Court under 28 U.S.C. § 1331. Defendants moved for summary judgment. The U.S. district judge, David D. Dowd, Jr., granted summary judgment to the Board of Commissioners of Mahoning County, Ohio. That order was not contested. Judge Dowd denied the motions for summary judgment of the two deputies, defendants Boggs and Tanner.

Boggs and Tanner filed their appeal to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit Court of Appeals reversed the denial of summary judgment by judgment entry and opinion filed May 22, 2002. Edward Wilhelm seeks the review of this Court through this petition for a writ of certiorari.

ARGUMENT

The Sixth Circuit Court of Appeals, after reviewing the factual history, held that jurisdiction was appropriate because the District Court's denial of summary judgment on the grounds of qualified immunity turned upon "abstract questions of law." The appellate Court held that the critical facts serving as a basis for the defendants' assertion of qualified immunity were: (1) the home at 4130 Crum Road was part of Charles Wilhelm's estate, (2) Sherl Foster was Administratrix of Charles Wilhelms' estate, and (3) Sherl Foster not only consented to but in fact *requested* defendants' entrance to the home. The appellate court did not emphasize, but implicit in its ultimate decision and its reference to the

case of *Chapman v. United States*, 365 U.S. 610 (1961), is the underlying fact that Edward Wilhelm was renting the premises from the Estate of Charles Wilhelm.

The appellate court formed the issue as: "Is Sherl Foster's consent to (really, request for) defendants' entrance to be considered valid third party consent such that plaintiff has, as a matter of law, failed to state a violation of clearly established law?"

The law relating to the searching of a tenant's premises is, and has been, well established. See *Chapman v. United States*, 365 U.S. 610, (1961). The *Chapman* case has been frequently cited for the general principle that a landlord who has ownership of the home, as well as some authority to enter the home for some purposes, cannot give valid consent to public authorities for entry into the tenant's household.

The principles of *Chapman* have withstood the passage of time. As Justice Scalia noted in his concurring opinion in *Minnesota v. Carter*, 525 U.S. 83, 96 (1998), this Court correctly decided *Chapman* in applying the Fourth Amendment protections to a leaseholder. Justice Scalia noted: "People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent-free - *so long as they actually live there*. That this is the criterion of the people's protection against government intrusion into 'their' houses is established by the leading American case of *Oystead v. Shed*, 13 Mass. 520 (1816)."

The Sixth Circuit, too, has referenced the general principle in *Chapman*. *United States v. Jenkins*, 92 F.3d 430 (C.A. 6th, Tenn., 1996) (an officer usually cannot assume that a landlord has authority to consent to search of property used by a tenant). *Haines v. Saginaw Police Dept.*, 35 F.3d 565 (Table) (C.A. 6th, Mich., 1994) (general rule that a landlord does not have common authority over apartment rented to another so as to make permissible a police officer's warrantless search of the apartment with the landlord's consent). While the above cases note exceptions, the general rule is well established and well recognized in the law. It is the type of "clearly established" law a violation of which should not be relieved by a qualified immunity. That special facts may on occasion avoid application of the general rule does not destroy the established general rule.

The appellate court in the case below clearly understood the law of *Chapman* and its application to this case. However, the appellate court, based upon its decision in *United States v. Roark*, 36 F.3d 14 (6th Cir. 1994) apparently felt compelled to apply qualified immunity presuming that *Roark* confused the law enough that the federal right infringed upon was not "clearly established."

There are certain areas of the law which are, or should be, well enough defined that qualified immunity cannot be founded on the extension of a case arguably incorrectly decided and in conflict with the established law stated by the highest court in the land.

This Court has stated that "clearly established", for purposes of qualified immunity, means that the legal right must be sufficiently clear that a reasonable official would understand that what he is doing violates that legal right. See *Wilson v. Layne*, 526 U.S. 603, 609 (1999). In *Wilson*, as in *Minnesota v. Carter*, supra, this Court explored in significant detail the embodiment within the Fourth Amendment of the centuries-old principle of respect for the privacy of the home.

The doctrine of common authority expressed in *United States v. Matlock*, 415 U.S. 164 (1974), permits a joint occupant of a residence to voluntarily consent to a search of the premises. In defining the scope of common authority, this Court stated: "Recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom the authority is shared." Id. at 170.

"Common authority" is not usually extended when the person relied upon for common authority has ownership interests only but is not an occupant, resident or cohabitant of the residence. Further, "common authority," applied to a person possessing an ownership interest but who is not an occupant of the premises, would never apply when the actual occupants of the premises are present and refuse consent.

The appellate court below acknowledges that its decision in *Roark* "fails to provide a rationale for its departure from the Supreme Court's concept of 'common authority' as

set forth in *Matlock*," and if *Roark* were generally applied, it would be in direct conflict with the well-established law of *Chapman*. *Wilhelm v. Boggs*, 290 F.3d 822, 826 (2002).

When an appellate court departs from Supreme Court case law without rationale, this departure cannot serve as a basis to find that the established precedential law is no longer clearly established.

CONCLUSION

While the Sixth Circuit Court of Appeals held in *United States v. Roark*, 36 F.3d 14 (6th Cir. 1994), that a sister who owned two houses on the same property could have consented to let police officials into one of the two houses in which her brother resided, this in no way changes the established law that would apply to the case before this Court. Where a tenant in a property owned by an estate resides in the property and is actively present and refusing entrance to the property when deputies seek entrance, the fact that the administrator of the estate consents to the entrance does not establish common authority and is inconsistent with the longstanding law of *Chapman v. United States*, 365 U.S. 610 (1961).

Police officers know the sanctity of the home. Only the most exigent circumstances justify entry without an appropriate court order. An appellate court cannot grant qualified immunity upon case law which the appellate court

acknowledges to be directly inconsistent with and a departure from the well-established case law of the United States Supreme Court.

For the reasons stated, the petitioner respectfully requests that this Court accept this case upon the merits for full review and determination of the weight to be given to established United States Supreme Court opinions when determining whether a clearly established legal right exists.

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED App. 0182P (6th Cir.)
File Name: 02a0182p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 22, 2002

Leonard Green
Clerk

EDWARD WILHELM,
Plaintiff-Appellee,

v.

No. 00-4459

JOHN A. BOGGS, Deputy, and
JOSEPH TANNER, Deputy,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 00-01029 - David D. Dowd, Jr., District Judge.

Submitted: May 1, 2002

Decided and Filed: May 22, 2002

Before: **SUHRENHEINRICH** and **GILMAN**, Circuit Judges;
HOOD, District Judge.*

---

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

COUNSEL

ON BRIEF: Thomas N. Michaels, OFFICE OF THE MAHONING COUNTY PROSECUTOR, Youngstown, Ohio, for Appellants. David J. Gerchak, Boardman, Ohio, for Appellee.

OPINION

JOSEPH M. HOOD, District Judge. Defendants appeal the district court's denial of defendant's motion for summary judgment on the basis of qualified immunity. For the reasons that follow, we REVERSE and REMAND.

I. Factual History

It is axiomatic that "a defendant seeking to take an interlocutory appeal from the denial of qualified immunity 'should be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the case.'" *Booher v. N. Ky. Univ. Bd. of Regents* , 163 F.3d 395, 396 (6th Cir. 1998)(quoting *Berryman v. Rieger*, 150 F.3d 561, 564 (6th Cir. 1998)). In the instant case, plaintiff/appellee in his brief adopts the district court's recitation of the facts and concedes that the district court in its

order construed the evidence "in the light most favorable to [him]." Defendants/appellants also accept the undisputed facts as recounted by the district court:

> This case grows out of a family dispute brought on by the death of Charles Wilhelm, father of the plaintiff. Charles Wilhelm died more than [five] years ago....The plaintiff was the initial fiduciary for his father's estate, but was subsequently removed and his sister, Sherl Foster, was appointed as the administratrix of the estate of Charles Wilhelm. The property at 4130 Crum Road in Austintown [Ohio] is an asset of the estate of Charles Wilhelm. The plaintiff has resided in the Crum Road property since the death of Charles Wilhelm. Sherl Foster, in her capacity as administratrix of the estate, concluded that she needed to conduct an inventory at 4130 Crum Road and secured the cooperation of defendants Deputy Sheriffs Boggs and Tanner to assist in the inventory.
>
> The essence of the plaintiff's case is that Boggs and Tanner violated his Fourth Amendment rights on December 15, 1999 by accompanying Foster to the Crum Road property and insisting upon the admittance of Foster to permit her to conduct the inventory.
>
> The plaintiff alleges that the deputies insisted that

they were there pursuant to an order of the Probate Court. The deputy sheriffs concede that there was no court order justifying their conduct, but they deny any wrongdoing based upon their sworn affidavits that the plaintiff gave consent to their entry into the Crum Road property. Alternatively, Deputy Sheriffs Boggs and Tanner contend that they are entitled to a dismissal of the plaintiff's claims based upon qualified immunity.

II. Jurisdiction

In any appeal from a denial of summary judgment based on qualified immunity, an appellate court must first address the basic question whether jurisdiction is proper. This is so because interlocutory appellate jurisdiction over district court denials of qualified immunity does not always lie.

That district court denials of qualified immunity are "collateral orders" under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), was first made clear in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). There, the United States Supreme Court held that a district court's summary judgment order is an immediately appealable "collateral order" where (1) the defendant is a public official asserting the defense of qualified immunity, and (2) the issue appealed concerns not which facts the parties might be able to prove, but, rather,

whether certain given facts reflect a violation of clearly established law. *Id.*

Later, in *Jones v. Johnson*, 515 U.S. 304 (1995), the Supreme Court further clarified that appellate jurisdiction over district court denials of summary judgment based on qualified immunity does not always lie, emphasizing that appellate jurisdiction is proper only where a district court's qualified immunity ruling involves questions of law. The Court held in *Jones* that, because "the order in question resolved a *fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial...., defendants cannot immediately appeal this kind of fact-related district court determination." *Id.* at 307. The Court went on to add that "the District Court's determination that the summary judgment record in [the] case raised a genuine issue of fact" rendered interlocutory appeal inappropriate. *Id.* at 313

These considerations notwithstanding, however, it does not follow that the existence of *any* question of fact renders a denial of summary judgment on the basis of qualified immunity non-appealable. This principle was made clearing *Behrens v. Pelletier*, 516 U.S. 299, 314-314(1996). There, the Supreme Court noted that"[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, and *Johnson* surely does not mean that

every such denial of summary judgment is non-appealable." *Id. at 312-313 (citations omitted).* The Court went on to make clear that *Johnson* reaffirmed that summary judgment concerning an abstract issue of law relating to qualified immunity - typically, the issue whether the federal right allegedly infringed was clearly established." *Id.* At 313 (internal quotations omitted).

The principle that appellate jurisdiction lies when district court denials of summary judgment on the ground of qualified immunity turn on "abstract questions of law" was explained in great depth by an en banc panel of this court in *Williams v. Mehra,* 186 F.3d(6th Cir. 1999)(en banc). There, in the basis of qualified immunity, this court first reiterated the well-settled rule that such denials of summary judgment are appealable so long as "*the issue on appeal is not what facts the parties may be able to prove, but whether the plaintiff's facts, taken at their best, showing a violation of clearly established law.*" *Id.* At 689 (citing *Johnson v. Jones,* 515 U.S. 304, 311 (1995))(emphasis added). The court noted that "*regardless of the district court's reasons* for denying qualified immunity, we may exercise jurisdiction."*Id.* at 689-90 (quoting Dickerson v. McClellan, 101 F.3d 1151, 1157 (6th Cir. 1996)(emphasis added)).

Applying these principles to the instant case, appellate jurisdiction exists. Although there remain controverted

questions of fact, these facts are extraneous and irrelevant to the qualified immunity question. Fundamentally, there is no dispute as to the troika of critical facts serving as the basis for defendants' assertion of qualified immunity. Those facts are: (1) the home at 4130 Crum Road was Charles Wilhelm's estate, (2) Sherl Foster was administratrix of Charles Wilhelm's estate, and (3) Sherl Foster not only consented to but in fact *requested* defendants' entrance to the home. These three facts considered together shape the legal issue not considered by the district court but now squarely before this panel: Is Sherl Foster's consent to (really, request for) defendants' entrance to be considered valid third-party consent such that plaintiff has, as a matter of law, failed to state a violation of clearly established law? If so, defendants are entitled to qualified immunity and the district court erred in denying defendants' motion for summary judgment.

III. Analysis

The United States Supreme Court reaffirmed the principle of third part consent to Fourth Amendment searches and seizures in *United States v. Matlock*, 415 U.S. 164 (1974). There, the Court held that "the consent of one who possesses common authority over premises or effects is valid against the absent, non-consenting person with whom that authority is shared." *Id.* at 170.

The Court took the notion of "common authority" one

step further in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), wherein the Court addressed a crucial issue expressly reserved in *Matlock*. The Court put that questions as follows: " Whether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, but who in fact [does not]." *Id.* at 179. The Court answered in the affirmative.

The court, too, has had occasion to explore the concept of third-party consent- and under circumstances similar to those present by the instant case. In *United States v. Roark*, 36 F.3d 14 (6th Cir. 1994), defendant lived in a home owned by his sister who lived in the primary residence located on the same property, but who testified she lacked authorization to enter her brother's home without his permission. After defendant's sister consented to a search of the home in which defendant was living, police found substantial amounts of marijuana and defendant was arrested. Defendant plead guilty to illegal drug and firearm possession, but reserved his right to appeal the district court's denial of his motion to suppress. On appeal, this court first addressed whether, as an initial matter, defendant's sister possessed the authority to consent to a search of the home of which she was the owner but in which defendant resided. The court held that defendant's sister was so authorized. *Id.* at 17. ("[Defendant's sister], by way of her ownership or common control, had the authority to consent to

the objectionable search.") The court reversed, however, on other grounds.

Although we hold that the sheriff's deputies are entitled to qualified immunity in light of *Roark*, this is not to say that we are in agreement that *Roark* was correctly decided. *Roark* fails to provide a rationale for its departure from the Supreme Court's concept of "common authority" as set forth in *Matlock*, which defines "common authority" as:

> the mutual use of the property by persons generally having joint control for most purposes so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their members might permit the common area to be searched.

Matlock, 415 U.S. at 172. If *Roark* were generally applied, then, for example, an absentee landlord would have the ability to consent to the search of a tenant's residence. That is not the law. *See, e.g., Chapman v. United States*, 365 U.S. 610 (1961)(holding that a landlord cannot validly consent to the search of a house he has rented to another). Because the issue before us is qualified immunity, rather than a direct challenge to *Roark*, we have no need to explore the matter any further in this case.

IV. Conclusion

For the reasons expressed herein, the decision of the district court denying the defendants qualified immunity is **REVERSED** and the case is **REMANDED** for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4459

EDWARD WILHELM,
Plaintiff-Appellee,

FILED
May 22, 2002

Leonard Green,
Clerk

v.

JOHN A. BOGGS, Deputy; JOSEPH TANNER, Deputy,
Defendants-Appellants.

Before: **SUHRHEINRICH** and **GILMAN**, Circuit Court Judges; **HOOD**, District Judge.

JUDGMENT

On Appeal form the United States District Court
for the Northern District of Ohio at Akron.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is **ORDERED** that the judgment of the district court denying the defendants qualified immunity is **REVERSED** and the case is **REMANDED** for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD WILHELM,	)	
Plaintiff,	)	**Case No. 4:00 CV 1029**
	)	
vs.	)	**Memorandum Opinion**
	)	
JOHN A. BOGGS,	)	
Deputy, et al.,	)	
Defendants.	)	

FILED
Nov 3, 2000
Northern District
of Ohio
by Deputy Clerk

The defendants, John A. Boggs and Joseph Tanner, Deputy Sheriffs in Mahoning County, and the Board of Commissioners of Mahoning County, have moved for summary judgment declaring there to be no genuine issue of material fact. (Dkt. #16) The plaintiff has responded and disputes the claim that there are no genuine issues of material fact.

This case grows out of a family dispute brought on by the death of Charles Wilhelm, father of the plaintiff. Charles Wilhelm died more than three years ago and the administration of his estate is still pending in the Probate Court of Mahoning County. The plaintiff was the initial fiduciary for his father's estate, but was subsequently removed and his sister, Sherl Foster, was appointed as the

adminstratrix of the estate of Charles Wilhelm. The property at 4130 Crum Road in Austintown is an asset of the estate of Charles Wilhelm. The plaintiff has resided in the Crum Road property since the death of Charles Wilhelm. Sherl Foster, in her capacity as administratrix of the estate, conlcuded that she needed to conduct an inventory at 4130 Crum Road and secured the cooperation of defendants Deputy Sheriffs Boggs and Tanner to assist in the inventory.

The essence of the plaintiff's case is that Boggs and Tanner violated his Fourth Amendment rights on December 15, 1999 by accompanying Foster to the Crum Road property and insisting upon the admittance of Foster to permit her to conduct the inventory.

The plaintiff alleges that the deputies insisted that they were there pursuant to an order of the Probate Court. The deputy sheriffs conceded that there was no court order justifying their conduct, but they deny any wrongdoing based upon their sworn affidavits that the plaintiff gave consent to their entry into the Crum Road property. Alternatively, Deputy Sheriffs Boggs and Tanner contend that they are entitled to a dismissal of the plaintiff's claims based upon qualified immunity.

There clearly are material facts in dispute. The affidavits of John Boggs and Joseph Tanner asserting consent

are attached as Appendices 1 and 2[1]. The affidavits of Edward Wilhelm and his female friend, Laura Jeffers, who contends that shw was present on December 15, 1999, are attached as Appendices 3 and 4. Wilhelm and Jeffers deny the giving of consent.

As Boggs and Tanner concede that they had no court order justifying their conduct and given the factual dispute as set forth in the four appendices, the invocation of the qualified immunity defense asserted by Boggs and Tanner fails. See Johnson v. Jones, 515 U.S. 304 (1995).

The motion of the Board of Commissioners of Mahoning County for summary judgment is anchored in the proposition that there is no evidence of a policy or custom of Mahoning County that would justify liability on the part of Mahoning County. The response brief of the plaintiff does not contest the motions of the Board of Commissioners of Mahoning County for summary judgment. There is no basis for the plaintiff's claim against Mahoning County. The motion of the Board of Commissioners of Mahoning County is granted.[2]

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[1] Sherl Foster also signed an affidavit which alleged that Edward Wilhelm invited Boggs and Tanner into the Crum Road property.

[2] The plaintiff's complaint also joins the Mahoning County Sheriff's Department. The Sheriff's Department is not *sui juris*. To the extent the plaintiff's action is to be construed

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

---

as an action against the Mahoning County Sheriff's Department, the same is dismissed. This case shall proceed to trial on the claims of the plaintiff against John A. Boggs and Joseph Tanner in their individual capacities only. The assets of Mahoning County are not involved in this action by reason of the Court's granting of the summary judgment on behalf of the Board of Commisioners of Mahoning County.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD WILHELM,	)	
Plaintiff,	)	**CASE NO. 4:00 CV 1029**
	)	
vs.	)	**JUDGMENT ENTRY**
	)	
JOHN A. BOGGS,	)	
Deputy, et al.,	)	
Defendants.	)	

FILED
Nov 3, 2000
Northern District
of Ohio
by Deputy Clerk

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, the motion of the defendant Board of Commissioners of Mahoning County for summary judgment is **GRANTED**. The motion of the defendants John A. Boggs and Joseph Tanner, acting in their individual capacity, for summary judgment against the plaintiff is **DENIED**.

This case remains on the trial list for the two week period beginning December 4, 2000.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MAHONING COUNTY, OHIO

IN THE MATTER OF	**) Case No.: 97 E 521**
THE ESTATE OF:	**)**
	) Judge Timothy P. Maloney
CHARLES J. WILHELM,	**)**
DECEASED	**) Magistrate's Order**
	)

FILED
Oct 27, 1998
Northern District of Ohio
by Deputy Clerk

Hearing called. Present was Attorney Fred H. Bailey; the Fiduciary, Charles Wilhelm; Attorney Thomas E. Schubert and his clients, Sherl Foster, David Wilhelm and Joyce Wilkinson.

The Fiduciary showed proof of insurance on the property at 4130 Crum Road, Youngstown, Ohio. However, the declaration page lists himself as the insured. He states that this had been changed to reflect that the Estate is now the insured party. There is no indication of any personal property being sold from the Estate. The home and the contents of the home have been appraised, although, the issue has now been raised about the appraisal of the items which are the subject of exceptions to the inventory filed by Attorney Thomas Schubert on behalf of his clients. Attorney Fred Bailey stated that a bill for rent has been sent to Edward Wilhelm, who

continues to reside in the property at 4130 Crum Road, Youngstown, Ohio. Statements were made that approximately 75% of the pole building is being used to store items that apparently belong to Mr. Ed Wilhelm.

The motion to remove the Fiduciary is denied. The Fiduciary is Ordered to provide proof of insurance, reflecting the Estate as the insured party. Said proof of Insurance to be filed with the Court ans mailed to Attorney Thomas Schubert a copy of a bill for rent being sent to Mr. Ed Wilhelm, effective Jul 1, 1998 and for each month thereafter, at the rate of $418.75 per month. All utility bills should also be paid by Ed Wilhelm. A copy of the rent bill shall be provided to the Court and Attorney Thomas Schubert by November 2, 1998. If the full rent is not received within thirty (30) days of receipt of the bill by Mr. Ed Wilhelm, the Fiduciary shall then immediately begin eviction proceedings.

A copy of this entry to be sent to the Fiduciary; Attorney Fred H. Bailey; Attorney Thomas E. Schubert; and Attorney James Vitullo.

All until further Order of the Court.

Dated: October 27, 1998

/s/ Gary J. Philibin
Gary J. Philibin, Magistrate

(2)

Supreme Court, U.S.
FILED
SEP 24 2002
OFFICE OF THE CLERK

No. 02-293

IN THE

Supreme Court of the United States

EDWARD WILHELM,

Petitioner,

v.

JOHN A. BOGGS, Deputy and
JOSEPH TANNER, Deputy,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner frames his sole statement of the question as follows:

> Can an appellate court reviewing the denial of a motion for summary judgment on the issue of qualified immunity refuse to apply a general rule established by the United States Supreme Court upon the sole basis that an opinion of the appellate court, if extended, may be inconsistent with the established law?

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit and the United States District Court, Northern District of Ohio, set forth the pertinent facts related to Wilhelm's claims. (Pet'r. App. A at A-1 and App. C at C-1).

Briefly stated, this case involves an incident that occurred on December 15, 1999 at 4130 Crum Road, Austintown, Ohio. The property located thereon was owned by the estate of Wilhelm's deceased father. Sheryl Foster, Wilhelm's sister, was appointed by the Mahoning County Probate Court as administratrix of her deceased father's estate. Upon the instructions of the attorney representing the estate, Foster went to the Crum Road property on December 15, 1999 to conduct an inventory of the property's assets.

Due to prior threats made against her by Wilhelm, who was staying at the Crum Road property, Foster elected to take sheriff's deputies Boggs and Tanner to accompany her while she entered the premises. Once at the home, Foster directed Boggs and Tanner to enter the home to insure that Wilhelm did not become combative with her. At that time, Boggs and Tanner entered the home. However, neither Boggs nor Tanner participated in the inventory completed by Foster.

Wilhelm filed suit in the District Court alleging violations of his Fourth Amendment right to be free of unreasonable searches and seizures.

REASONS FOR DENYING THE PETITION

1. Wilhelm Has Not Articulated A Compelling Reason To Justify Discretionary Review By This Court.

"Review on a Writ of Certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A Petition for a Writ of Certiorari will be granted only for compelling reasons." Wilhelm has not presented any compelling reasons for this Court to

exercise discretionary jurisdiction over his appeal of the Sixth Circuit's decision reversing the order of the District Court.

2. The Sixth Circuit Court Of Appeals Properly Reversed The Decision Of The District Court.

In support of his argument that the Appellate Court decision was in error, Wilhelm relies primarily on the decision rendered by this Court in *Chapman v. United States*, 365 U.S. 610 (1961). In *Chapman*, the Court determined that a landlord cannot validly consent to the search of a home he has rented to another. However, after *Chapman*, this Court rendered its decision in *United States v. Matlock*, 415 U.S. 164 (1974), wherein the Court found that a search conducted pursuant to consent by an authorized third party does not require probable cause or a warrant. Then, in *Illinois v. Rodriquez*, 497 U.S. 177 (1990), this Court held that the Fourth Amendment is not violated when officers enter a residence without a warrant because they reasonably believe that the person who has consented to the entry is a resident of the premises. If a third party does not have actual authority to consent, law enforcement officers may nevertheless rely on his or her consent so long as the facts available to the officer at the moment would warrant a man of reasonable caution in the belief that the consenting party had authority over the premises. *Id.* Thus, Wilhelm's complete reliance on *Chapman*, without discussing the aforementioned intervening cases of this Court, is surely myopic.

Further, Wilhelm's argument in favor of this Court's exercise of jurisdiction displays a fundamental misunderstanding of the nature and scope of the affirmative defense of qualified immunity. Indeed, Wilhelm neglects to even discuss the qualified immunity issue in his petition. Clearly, in light of this Court's recent decision in *Saucier v. Katz*, 533 U.S. 194 (2001), the issue of qualified immunity must enjoy a paramount role in the Court's disposition of this case.

Typically when determining whether a public official is entitled to qualified immunity, a two prong test is employed. *See County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). First, the Court must determine whether a constitutional right was violated. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Next, the Court should determine whether that right was "clearly established." *Id.* "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "If the controlling law is not clearly established, an official cannot be liable because a reasonable person would not be expected to know how to structure his conduct in order to avoid liability." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994).

Further, the inquiry for determining whether a right is clearly established must be undertaken in light of the specific context of the case, not as a broad general proposition. *Saucier v. Katz*, 533 U.S. at 201. Finally, in *Anderson v. Creighton*, 483 U.S. 635, this Court found that although the objective reasonableness component of the qualified immunity analysis may at times seem to merge with a factual inquiry on an underlying Fourth Amendment claim, the inquiries must be distinct.

Under this standard, Wilhelm has failed to meet his burden of proving that the right allegedly violated was "clearly established" at the time the alleged violation occurred. The right allegedly violated was the Fourth Amendment right not to have a law enforcement officer enter the premises when an individual with a valid third party consent directs the law enforcement officers to enter. Unfortunately for Wilhelm, he has utterly failed to cite any case that establishes such a right, nor is it self evident. The factual scenario at issue in this matter is not one that appears to have been addressed in the case law. Thus, it would not be "clear to a reasonable officer that his conduct was unlawful in

the situation he confronted." *Saucier* 533 U.S. at 202. Consequently, the right asserted here was not clearly established.

The only decisions cited by Wilhelm actually support the Respondents' position that qualified immunity was appropriate. First, Wilhelm cites the unreported Sixth Circuit decision of *Haines v. Saginaw Police Dept.*, 35 F.3d 565 (Table) (6th Cir. 1994). In *Haines*, a landlord called the police department after she found two safe boxes in an apartment she was cleaning. After officers of the Saginaw Michigan Police Department entered Haines' apartment, they confiscated the safe boxes and charged Haines with several theft related offenses. After the criminal charges were later dismissed, for lack of evidence, Haines filed suit pursuant to 42 U.S.C. § 1983 for alleged violations of his Fourth Amendment rights.

The Court determined that no Fourth Amendment violation occurred because a valid third party consent was given by the landlord. Relying heavily on this Court's decision in *Illinois v. Rodriquez*, *supra*, the court found that summary judgment was appropriate even though a genuine dispute as to whether Haines had actually vacated his apartment may have existed. The court reasoned that "the question is not whether [the landlord] actually had the authority to consent to the search, but rather whether it was reasonable for the officers to believe that she did."

Next, Wilhelm cites the Sixth Circuit case of *United States v. Jenkins*, 92 F.3d 430 (6th Cir. 1996). Again, Wilhelm's reliance is materially misplaced. In *Jenkins*, the court was faced with determining whether a driver of a tractor trailer rig could consent to the search of the vehicle which was owned by the company the driver was working for. In determining that the consent was valid, the court found that "an officer is justified in thinking that the driver has authority to consent unless the officer knows (or is told) other information indicating that the usual assumption is incorrect." *Jenkins*, 92 F. 3d at 438. Further, the court decided

that "[b]ecause a reasonable officer in Trooper Lopez's position could have thought Holt had authority to consent to a search of the trailer, the consent validates the otherwise unreasonable search." *Id.*

Thus, in the cases cited by Wilhelm, the courts recognized the broad scope of the third party consent doctrine and determined that no Fourth Amendment violation occurred. Similarly, in this matter, based upon the information provided to the Respondents prior to their entering the premises on Crum Road, it is clear that an objectively reasonable officer in their position could have believed that Foster had common authority over the premises. Therefore, based upon applicable law of this Court, no Fourth Amendment violation occurred. Because there was no Fourth Amendment violation, the Appellate Court properly reversed the erroneous decision issued by the District Court.

CONCLUSION

Based upon the foregoing, Respondents respectfully request that the Court deny the petition of Edward Wilhelm for a Writ of Certiorari.

Respectfully submitted,

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